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HAROLD B. WILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 333.

EVERETT EDWARD HACK,
Petitioner, *Appellant below,*

v.

UNITED STATES OF AMERICA,
Respondent, *Appellee below.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Everett Edward Hack, hereinafter designated as defendant, prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Seventh Circuit, entered in the above entitled cause on June 24, 1953.

I

OPINIONS BELOW

This is a criminal case, tried by jury, and there is no memorandum opinion of the District Court; the instructions to the jury are not in the record.

The opinion of the Court of Appeals is not yet reported, but the majority opinion by Circuit Judges Finnegan and Swaim is in the record, pages 148-156; the separate opinion of Chief Judge Major, concurring in part, and dissenting in part, is on pages 156 and 157 of the record; when the petition for rehearing was denied "Judge Major voted to grant rehearing." (R. 167.)

II

BASIS OF THIS COURT'S JURISDICTION

The judgment of the Court of Appeals was rendered by a divided Court on June 24, 1953. (R. 158.) Defendant filed a petition for rehearing on July 7, 1953 (R. 159-165), which was overruled on July 16, 1953. (R. 167.) Mandate was stayed for 30 days on July 20, 1953 (R. 169); petition for further extension was filed on August 14, 1953 and on August 25, 1953 such extension was granted and the mandate was further stayed until and including September 14, 1953.

On August 12, 1953, Mr. Justice Jackson, for cause shown, upon the application of defendant, ordered that the time for filing petition for certiorari in this cause be extended to and including September 14, 1953.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28 U. S. C.

This petition is presented by Everett Edward Hack, who was a party to, and a defendant in, the judgment of the United States Court of Appeals for the Seventh Circuit.

III

QUESTIONS PRESENTED

ONE

Is either count of the indictment, as amended, sufficient to authorize the judgment of conviction thereon?

TWO

Is there any substantial evidence in the record to sustain the conviction of the defendant of having procured Ada Miller to pass a counterfeit 20-dollar federal reserve note in Indianapolis on December 15, 1951 as charged in Count I of the indictment?

THREE

Is there any substantial evidence in the record to sustain the conviction of the defendant of having conspired with Ada Miller and David Bocock, at Indianapolis, Indiana, to violate Title 18 U. S. C. Section 472, by passing, and causing to be passed, with intent to defraud, of counterfeited obligations of the United States, as charged in Count II of the indictment?

FOUR

Did the Court commit reversible error in refusing defendant the right to file an amended motion for a new

trial and to present therein the question of the alleged inadequacy of his own personally selected counsel?

FIVE

Has the defendant suffered double punishment in the sentence of five years on the first count and three years on the second count, the evidence relied on by the Government being the same as to both counts?

STATUTES INVOLVED

Section 472, Title 18 U. S. C. provides that:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell * * * any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Section 2, Title 18 U. S. C. provides that:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Section 371, Title 18 U. S. C. provides that:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides that no person shall be

> "subject for the same offense to be twice put in jeopardy of life or limb" * * * nor be "deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

V

SUMMARY STATEMENT OF THE MATTER INVOLVED

Count I (18 U. S. C. Section 472) charged that on or about the 15th day of December, 1951, Ada Miller did, at Indianapolis, Indiana, in the Indianapolis Division of the Southern District of Indiana, with intent to defraud, pass a counterfeited obligation of the United States, to-wit: a 20-dollar federal reserve note on the Federal Reserve Bank of New York, New York; that Edward Everett Hack and David D. Bocock did procure the commission of said offense by Ada Miller. (R. 1, 2.)

Count II (18 U. S. C. 371) charged that on or about the 13th day of December, 1951, and continuously thereafter until the 20th day of December, 1951, Edward Everett Hack, Ada Miller and David Bocock did, at Indianapolis, Indiana, in the Indianapolis Division of the Southern District of Indiana, conspire to commit an offense against the United States, to-wit: to violate Title 18 U. S. C. Section 472, by passing and causing to be passed, with intent to defraud, counterfeited obligations of the United States, and the following of said persons did the following acts to affect the object of said conspiracy. The overt

acts alleged are omitted because defendant claims the indictment does not charge an offense, and there is no evidence to support the charge as made in the conspiracy count. (R. 2.)

On the 28th day of March, 1952, the attorney for the United States asked leave of Court to amend the indictment by reversing the name of Edward Everett Hack, to Everett Edward Hack, which leave was granted by the Court and the indictment was amended accordingly. (R. 3.)

The defendants entered a plea of not guilty, and on November 12 and 13, 1952, they were jointly tried by jury, being represented by counsel of their own choice; defendants' motion for judgment of acquittal at the close of the Government's case was made on November 12, 1952 (R. 61) and overruled on November 13, 1952 (R. 64, 65, 66, 134); the Government admitted that the actual passing of the note at the Goodman Store "was restricted to Ada Miller" (R. 61), and admitted that "There is no direct proof that these men (Hack and Bocock) induced or procured Ada Miller to pass it." (R. 62.)

The defendants were found guilty as charged in both counts of the indictment (R. 133) and on November 13, 1952 the defendant, Everett Edward Hack, was sentenced by the Court to five years on Count I, and to three years on Count II, the latter sentence to begin to run after the completion of, or the legal release from, the sentence imposed upon him under Count I. (R. 134, 135.)

Defendant Hack filed a motion for a new trial on November 17, 1952, alleging that (1) the verdict is contrary to the weight of the evidence and (2) the verdict is not supported by substantial evidence (R. 136); on December 15, 1952, the defendant Hack, having obtained other counsel, filed a petition for leave of Court to file an amended

motion for new trial, and to include in such amended motion "allegations of inadequate counsel during trial based upon the allegations of only one hour's preparation for trial, absence of material defense witnesses pertinent to alibi, and unchallenged hearsay evidence" (R. 138); these motions were denied by the Court on December 16, 1952. (R. 139.) His notice of appeal to the United States Court of Appeals for the Seventh Circuit was filed on December 22, 1952 (R. 140); he was admitted to bail pending appeal. (R. 141.)

The contested issues in the Court of Appeals which are brought forward in this petition were: (1) whether or not the evidence was sufficient to support the verdict as to defendant Everett Edward Hack under either or all counts of the indictment; (2) whether or not the weight of the evidence was contrary to the verdict as to Everett Edward Hack under either or all counts of the indictment (R. 151); and (3) allegations of inadequate counsel during the trial based upon allegations showing merely one hour of preparation for trial, absence of material defense witnesses, and unchallenged hearsay evidence. (R. 151, 152.)

The issue concerning the allegation of inadequate counsel during the trial first appears in the direct examination of Monroe Ellis Hack where, on pages 24 and 25, the witness was relating a conversation between himself and his wife, and the trial Court, on page 26, said:

> "The Court: I would like to interrupt here a moment. Is there going to be any objections to any of this hearsay evidence?
>
> Mr. Blanchard: (For the Defts.) I would like him to ramble on, Judge. There's no objection to it.
>
> The Court: I don't want the jury to be misinformed in any way. I only want proper evidence to go before the jury. Are you waiving any objection?

Mr. Blanchard: (For the Defts.) I am waiving it, Judge. Let him bring it all out.

The Court: You may proceed."

Further hearsay testimony was permitted to go in on pages 26 and 27, and on page 28 the Court again interrupted as follows:

"The Court: May I interrupt again? Are you waiving objections to this hearsay evidence?

Mr. Blanchard: (For the Defts.) Well, to facilitate the trial, Judge, I will object to that.

The Court: You are waiving objection?

Mr. Blanchard: (For the Defts.) It doesn't make any difference. I just want to get through.

The Court: All right."

Very prejudicial hearsay testimony was given on pages 28, 29, 30, 31, 32, 33 and 34, and on page 35 the Court again raised the question as follows:

"The Court: Pardon me. Are you not going to object to any of this hearsay evidence?

Mr. Blanchard: (For the Defts.) That's the Commonwealth's witness—the District Attorney's witness, Judge, I will let him talk.

The Court: There is a lot of irrelevant—

Mr. Blanchard: (Interposing for the Defts.) Unless the Court wants to step in and stop it.

The Court: A lot of inadmissible evidence going in before the jury. It's the Government's case. You are waiving any objection?

Mr. Blanchard: (For the Defts.) Yes, Sir.

The Court: Let's proceed."

1. Defendant Everett Edward Hack was 34 years of age at the time of the trial; he had resided in Indianapolis, Indiana about 15 years; for about 5 years he had operated a Used Car Lot business at 3727 Massachusetts Avenue, Indianapolis, and had maintained his residence at that location, living in a house trailer on the used car lot. (R. 91.) His general reputation for veracity (he testified in his own behalf—R. 91), honesty and good conduct among those who knew him best was good. (R. 108.) The record does not disclose that he ever had any previous connection with crime.

2. He was a brother of the defendant, Ada Miller, and of Monroe Ellis Hack, each of whom maintained a residence in Louisville, Kentucky. (R. 22, 67.) Monroe Ellis Hack was a carpenter, and had previously built a garage for the defendant. (R. 41, 92.) Defendant Hack knew, and was a friend of, the defendant David Bocock (R. 92), who bought some cars and sold them from defendant Hack's used car lot, more or less on consignment. (R. 96.)

3. On or about the 9th day of December, 1951, defendant Everett Edward Hack, his wife, and Ada Miller, and David Bocock visited Monroe Ellis Hack and his wife, Virginia, at their residence in Louisville, Kentucky; Ada Miller had told Everett Edward Hack that Monroe Ellis Hack, whom Everett had not seen for about six years because of his being in California, was at their home in Louisville and they drove by (R. 78) and remained there about fifteen minutes. (R. 41.) The record does not disclose any part of the conversation at this meeting, except they asked Ada Miller to go back to Indianapolis with them, which she did. (R. 52.) This was the only time that Everett Edward Hack was in Louisville.

4. On or about the 11th day of December, 1951, Ada Miller, at the instance of Everett Edward Hack, called

Monroe Ellis Hack in Louisville, from Indianapolis, and asked him to come to Indianapolis to discuss with Everett the building of a garage. (R. 69, 92.) On the following day at approximately seven o'clock p. m. Monroe Ellis Hack, his wife, Virginia, and his son, Lloyd, arrived at Everett Edward Hack's used car lot in Indianapolis. Upon their arrival Monroe went into the office and Everett was there; Virginia and Lloyd started to walk in the office and Ada Miller came out and said a few words to Monroe and Everett and she then took Virginia and Lloyd into the trailer which was next door to the used car lot office. While Everett Edward Hack and Monroe Ellis Hack were in the car lot office they commenced an evening of discussion and the drinking of alcoholic beverages. (R. 23.) They talked of building a garage, and of Everett's employing Lloyd to drive cars for him which he would buy in Detroit and elsewhere, which Everett transported. (R. 94.)

5. According to the evidence of Monroe Ellis Hack, at this meeting on the night of December 12, 1951, Everett started in talking to him and explaining about a counterfeit money deal, and was bragging on how much money he had; Everett said he had more money than he knew what to do with; according to Monroe, he said, "Well, Everett, I don't know whether you have or not. From what I hear, you have all kinds of money and from what I see you have both good and bad, and—"For he had this money there and he was showing me this money around two-thousand dollars." Monroe said he pleaded with Everett to get him out of the racket, and told him it was dangerous, but Everett said, "I have got all kinds of money" and "I'm in it for the excitement." (R. 24.) Monroe testified that Everett showed him some of the money and said it was counterfeit money, the way he put it though that was

"real mint" (R. 37); Monroe testified that Everett wanted him to go in with him on it, and first wanted him to go back to California and be a distributor out there. Monroe said he tried to talk Everett out of it, but Everett finally told him, around midnight, or maybe one o'clock, "You be back here the following morning" and "I'll give you instructions where to go" and "I'll give you orders what to do." Monroe said he told Everett, "Well, I'll think it over." (R. 23, 24.) Monroe says they then went to get a cup of coffee and, after some further conversation about a very sore jaw which Lloyd had, and about getting medical treatment for it, Monroe Ellis Hack, his wife, Virginia, and his son, Lloyd, left the used car lot and proceeded to a downtown hotel in Indianapolis. Upon their departure from the car lot Monroe said to Everett, "We will see you in the morning." (R. 25.) Monroe testified that Everett had explained to him that he was the head man and Monroe should take orders from him. (R. 27.)

6. Monroe, Virginia and Lloyd got in their car and drove to the hotel, and, after renting rooms, called the police and asked for two plainclothes men to meet them at the hotel; they arrived in a very few minutes and advised Monroe to call the Secret Service; he called the Secret Service man and talked with him close to an hour; the Secret Service man advised that he should go to Louisville and gave Monroe a 'phone number to call when he got to Louisville; Monroe did not go back to see Everett, but during the day Monroe, Virginia and Lloyd drove from Indianapolis to Louisville, arriving there too late to contact the Secret Service there on Friday (R. 26); on Saturday Monroe failed to contact any officers in Louisville; Sunday night he called Captain Evans of the Louisville Police Department, relayed part of it to him and asked him to come to the bus station and meet him and his wife,

which he did; with Captain Evans they then went to Police Headquarters and talked for quite a while and Captain Evans said he would call one of the Secret Service agents and finally called Agent Geiglein; on Sunday night Monroe relayed everything of the findings to Mr. Geiglein; after different conferences between Agents Geiglein and Fitzgerald and Monroe, Geiglein gave Monroe instructions to get some sample money from them (R. 27, 28, 29); Monroe said that on Monday, December 17, he had asked Geiglein and Fitzgerald for gasoline money and they said "no"; they said he should call Indianapolis; he did call Everett at Indianapolis collect and Monroe asked Everett to send him some money so he could take his son back to Cincinnati to the hospital and get his mouth unwired and taken care of; Everett told him he would be down and would bring the money, but he never came (R. 27, 28); later, on Monday, Monroe learned that Ada Miller was in Louisville in her own home; he called upon Ada and after talking with her for a short time he went away and again called Mr. Geiglein and explained to him that Ada was in Louisville; Geiglein asked him to come on in to the Secret Service office, which he did, and Geiglein and Fitzgerald told him to "just go and get some samples." (R. 29.)

7. In the neighborhood of between 5 and 6 o'clock of the same day (Monday), Monroe and his wife went home and around 6 o'clock Ada Miller knocked on his door and told him there was a gentleman out there to see him; Monroe went out to the car and the defendant, Mr. Bocock, was in the car; Bocock says, "Well, I got the money, let's go out and see where you are; with us or with the law"; whereupon Bocock handed Monroe four 20-dollar bills (R. 30); Monroe got in his car and drove away, followed by Ada Miller and Bocock in their car; the first stop made was at a whisky store on Lexington Road where he pulled

up in front of the place and stopped; Bocock and Ada Miller parked across the street; Monroe went in and bought a half pint of "Old Tub" whisky and cashed one of the 20-dollar bills which had been given to him; the whisky came to $1.53; he took the whisky and the change and left that place of business; he got in his car and went to the next place, and bought another half pint of "Old Tub"; Ada and Bocock had followed him and he gave the whisky to Ada and the money to Bocock (R. 31); Ada and Bocock drove away and Monroe waited a while and directly they came back and asked if he had passed any other bills, and upon being advised that he had not, they told him to go out and pass the other two; Monroe went out and passed the other two, and, upon going back to the house, he gave the money to Ada Miller and Bocock (R. 32); Monroe finally got hold of Mr. Geiglein, and after he had passed these four, Mr. Bocock gave him ten more notes and told him to go out and pass them; it was around 6:30 in the evening by the time he had passed the first four. (R. 33.)

8. Monroe testified that he had been trying all evening to get in touch with Geiglein, but through some misunderstanding with respect to locations they did not meet as planned. (R. 33.) Later in the evening Monroe and Geiglein did meet and Monroe showed him six or seven of the counterfeit notes and told him he had received them from Bocock and Ada Miller and asked Geiglein to pick them up; Geiglein said he didn't have any money (R. 34); Geiglein called Agent Fitzgerald and told him that Monroe had the money; Monroe talked with Fitzgerald and asked him what he should do with the money, and Fitzgerald informed Monroe that the office didn't open until eight o'clock the next morning. (R. 35.) Neither Geiglein nor Fitzgerald took the counterfeit notes and no arrest was then

made; this conference was between midnight of December 17 and two o'clock a. m. on December 18, 1951. (R. 35.) Later, in the morning of December 18, 1951, Monroe Ellis Hack was arrested in Louisville by the Secret Service agents upon the charge of passing counterfeit notes the night before (R. 85), but after eleven days in jail he was released; at the time of his arrest they found six or seven counterfeit notes on him. (R. 47.)

9. On December 15, 1951 a woman identified as the defendant, Ada Miller, went into the Goodman Shoe Store, located at 5539 East Washington Street, Indianapolis, and passed what purported to be a 20-dollar bill, which was introduced in evidence as Government's Exhibit 1; it was a counterfeit 20-dollar federal reserve note on the Federal Reserve Bank of New York, New York. It was in similitude to the genuine 20-dollar federal reserve notes issued by the United States Government. (R. 6-11, 17, 18.) Special Agent George B. Loy testified that it was a dangerous and deceptive counterfeit note and that the average merchant would be apt to take in such a counterfeit note and not be able to tell its counterfeit nature. (R. 18.) The same person identified as defendant Ada Miller gave one of such notes to the cashier in the A & P Grocery Store at 5541 East Washington Street on the same day for some groceries, and when the cashier hesitated in making the change the woman said, "Honey, if you can't change that, I will give you a smaller bill"; she gave the cashier a smaller bill and took back the 20-dollar bill and left the store. (R. 11, 12.) Defendant Ada Miller testified in her own behalf and said she was never in either of those stores and she did not pass, or attempt to pass, either of said notes and that she was in Louisville on December 15, 1951. (R. 76, 78.) There is no evidence to show that the woman who passed, and attempted to pass, said notes on Decem-

ber 15, 1951 had any intent to defraud or that she had any knowledge that said notes were counterfeit.

Government's Exhibit 2 was identified as a package which Secret Service Agent Loy obtained at the Indianapolis Post Office in executing a search warrant on February 14, 1952, and he had taken from the package a quantity of counterfeit 20-dollar federal reserve notes on the Federal Reserve Bank of New York, New York, and marked them with his initials and the date he obtained them; the package contained $2,360 worth of counterfeit 20-dollar notes, had they been genuine; each bore the same serial number as Government's Exhibit No. 1, B-70909801-D. (R. 18.) The package had been wrapped, and addressed by defendant Ada Miller to William Brown and William Branham, c/o of Gen. Del. Indianapolis, Ind. (R. 19.) It was caused to be mailed in Louisville on or about December 19, 1951 (R. 53), by Ada Miller and Monroe Ellis Hack (R. 73, 74), but Ada Miller denied having knowledge of its contents. (R. 73.) Virginia Hack, wife of Monroe Ellis Hack, closely resembles the defendant, Ada Miller. Both of these individuals have practically the same height and build, and on different occasions have been mistakenly identified as the same person. (R. 70.)

10. At the time of the arrest of defendant Everett Edward Hack, on December 20, 1951, Agent Loy, and other agents under his direction, searched the office room of the Hack Auto Sales at 3727 Massachusetts Avenue; they did not find any counterfeit money on his place. (R. 20, 21.)

11. Everett Edward Hack testified in his own behalf and denied having any conversation with Monroe Ellis Hack about counterfeit money and said he did not discuss with him the uttering or passing of counterfeit money; he said he had never knowingly had any counterfeit money in

his possession, except a 20-dollar bill which he received from a customer in March, 1952, which he promptly turned over to Secret Service Agent Loy (R. 93, 94, 97, 98), which Loy confirmed. He said he never directly or indirectly passed any counterfeit money. (R. 95.)

Circuit Judges Finnegan and Swaim affirmed the judgment of the District Court upon the ground that the record discloses substantial evidence to support the conviction, and relied upon *Glasser* v. *United States*, 315 U. S. 60-80, *Sharp* v. *United States*, 195 F. (2d) 998, *United States* v. *Randall*, 164 F. (2d) 284 (R. 155); upon the issue of the alleged inadequacy of defendant's counsel, the Court of Appeals relied upon *Burton* v. *United States*, 151 F. (2d) 17, 18. (R. 153.)

Chief Judge Major filed a separate opinion wherein he said as to the conviction on Count I, "In my judgment, there is not a scintilla of evidence which in any manner, shape or form proves or tends to prove that appellant procured the commission of the offense alleged" (R. 157); as to Count II, Judge Major said, "I have decided, with some reluctance, that his testimony (Monroe Ellis Hack) was sufficient to connect appellant with the conspiracy charged in the second count. In other words, it presented an issue of fact for the jury" (R. 156); on appellant's petition for a rehearing Chief Judge Major "voted to grant rehearing." (R. 167.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In affirming the judgment, because the indictment failed to charge an offense, and because the indictment was altered.

2. In deciding that the record discloses substantial evi-

dence to support the conviction of defendant, Everett Edward Hack, as to Count I.

3. In deciding that the record discloses substantial evidence to support the conviction of defendant, Everett Edward Hack, as to Count II.

4. In deciding that defendant, Everett Edward Hack, was not entitled to file an amended motion for a new trial and present therein the question of the alleged inadequacy of his personally selected counsel in allowing an unusual amount of prejudicial hearsay testimony to be admitted without objections thereto.

5. In deciding that defendant could be punished twice for the same offense.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

COUNTS I AND II

1. Count I of the indictment does not allege that the counterfeit bill or note that was passed on December 15, 1951 was passed "with knowledge that it was counterfeited"; nor does it allege who was to be defrauded, nor to whom the note was passed; it therefore omits essential elements of the offense referred to, and it fails to charge either of the defendants with any crime. (R. 1, 2.) As to the defendant Hack, the first count also fails to charge him "with intent to defraud." Count II fails to charge that the conspiracy to pass counterfeit notes would be with knowledge that such notes were counterfeited.

The decision of the majority of the Court of Appeals is in conflict with the applicable decisions of this Court in:

(a) *United States* v. *Carll*, 105 U. S. 611, 613, where it was decided that an indictment, which charges the passing or uttering of a counterfeit instrument, must allege that

the defendant had knowledge that the instrument was counterfeited, and such allegation was essential to make out the crime.

(b) *United States* v. *Simmons,* 96 U. S. 360, 362, 366, which holds that an indictment which omits an essential element of the crime charged "is insufficient to authorize a judgment thereon." (366.)

(c) *United States* v. *Hess,* 124 U. S. 483, 488, which decides that an indictment which omits an essential element of the crime involved, is a matter of substance, and such omission is not aided or cured by verdict. This contention applies to both counts of the indictment, as a conspiracy to pass counterfeit instruments, without knowledge that they were counterfeit, would not constitute the crime of conspiracy. *United States* v. *Gardner,* 171 F. (2d) 753, 759. (7 C. A.)

2. The majority opinion of the Court of Appeals is a decision in conflict with a decision on the same matter in the Second Circuit in *United States* v. *Ruffino,* 67 F. (2d) 440, 441, where it was held that it was essential to the Government's case to establish by some evidence that defendants knew that the note was a counterfeit bill and was uttered, or passed, with intent to defraud; it is in conflict with the decision of the Sixth Circuit in *Hagan* v. *United States,* 295 Fed. 656, 658, where the Court held that specific knowledge or belief is made an essential element of the crime of passing counterfeit instruments.

3. The Court made an order granting leave to the United States Attorney to "amend the indictment by reversing the name of the defendant, Edward Everett Hack, to Everett Edward Hack * * * and the indictment is amended accordingly." (R. 3.) This procedure is in conflict with the former decision of this Court in a similar matter in *Ex parte Bain,* 121 U. S. 1.

4. This question was not directly presented to the lower courts, but we believe the defendants' motion for acquittal (R. 61) and the motion of Hack for a new trial (R. 136), would challenge the sufficiency of the indictment as to omission of essential parts. Regardless of whether it was presented, defendant now respectfully urges that the defects in the indictment, and its alteration, prejudicially affected his substantial rights, and the rendition of the judgment thereon was a plain defect and an error which should have been corrected by the trial Court as directed by Rule 12(b) (2), Federal Rules of Criminal Procedure, that "failure of the indictment to * * * charge an offense *shall be noticed* at any time during the pendency of the proceedings" (emphasis supplied), and should have been noticed by the Court of Appeals under its Rule 11 (b), Rule 52(b), Federal Rules of Criminal Procedure, and now should be noticed by this Court under Rule 52 (b) and its Rule 27, 6, as the question is of extraordinary importance in the trial and conviction of all defendants charged with crime.

QUESTION TWO

COUNT I

1. As Chief Judge Major points out in his dissenting opinion (R. 158), there is not a scintilla of evidence which in any manner, shape or form proves or tends to prove that defendant Hack procured the commission of the offense of passing the counterfeit bill of December 15, 1951.

2. There is not a word of testimony that Ada Miller received any counterfeit money from defendant Everett Edward Hack; or that they ever had any conversation relative thereto; or that Hack had any knowledge that she had counterfeit money, or that she intended to pass the same, or that he promoted the passage of said bill, or did any affirmative purposive act toward passing said bill,

and there are no circumstances which connect Hack with Ada Miller in any way with the passing of said bill on December 15, 1951; there is no evidence to show that defendant Hack, or the person who passed said counterfeit bill, had any knowledge that said bill was counterfeited, or had any intent to defraud, when the same was passed; the Government admitted that "it is perfectly true that the evidence in the case, so far as the actual passing of the note at that department store was restricted to Ada Miller" (R. 61); there is no evidence that defendant Hack associated himself in any manner with Ada Miller, or that he sought by his action to have the passage of such bill succeed, or that he participated in such act as in something that he wished to bring about, and there is no evidence to show that he had any connection with anyone in the passage of said bill, or that he procured, or counseled, or aided or abetted anyone in the passage of said bill.

3. The decision of the majority of the Court of Appeals that there was substantial evidence to support the conviction is in conflict with the decision of this Court in *Nye & Nissen* v. *United States* (1949), 336 U. S. 613, 619, 69 S. Ct. 766, 769, 770, where it is held that:

> "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

4. The majority opinion of the Court of Appeals is a decision in conflict with the decisions on the same matter in the Second Circuit in *United States* v. *Peoni*, 2 Cir. 100 F. (2d) 401, 402, *United States* v. *Falcone*, 2 Cir. 109 F. (2d) 579, 581, and *Tresca* v. *United States*, 2 Cir. 183 F. 736, 738, which hold that to convict one as an abettor, the evidence must show that the attitude of the defendant

toward the forbidden undertaking was positive; he must in some sense promote the unlawful venture himself, make it his own, and have a stake in its outcome; it must be shown that defendant did some affirmative purposive act toward the crime committed.

5. The decision of the majority of the Court of Appeals is in conflict with the decisions on the same matter in the Third Circuit in *Ayervais* v. *United States,* 72 F. (2d) 720, 721, and *Matchok, et al.* v. *United States,* 60 F. (2d) 266, 267, which hold that circumstantial evidence relied upon for conviction of a defendant of aiding and abetting must be more than suspicion, and must be such as to exclude every reasonable hypothesis but that of guilt.

6. The importance of this question is accentuated by the very decisive dissenting opinion of Chief Judge Major, and it goes to the very heart of criminal procedure in all cases where defendants are deprived of their liberty, where there is no evidence to show guilt.

QUESTION THREE

COUNT II

1. When this question was decided by the Court of Appeals on June 24, 1953, Chief Judge Major, in his separate opinion, said that, "I have decided, with some reluctance, that his (Monroe Ellis Hack) testimony was sufficient to connect appellant with the conspiracy charged in the second count." (R. 156.) When the petition for rehearing was denied by Circuit Judges Finnegan and Swaim, "Judge Major voted to grant rehearing." (R. 167.)

2. Defendant now respectfully urges that there is no evidence to establish the charge in Count II that on or about December 13th to December 20th, 1951, Edward Everett Hack, Ada Miller and David Bocock did, at In-

dianapolis, Indiana, conspire to commit an offense against the United States, to-wit: to violate Title 18 U. S. C., Section 472, by passing and causing to be passed, with intent to defraud, counterfeited obligations of the United States. (R. 2.)

3. The conspiracy charged was not proved; there is no evidence of *corpus delecti* as to the conspiracy charged; the conversation between Monroe Ellis Hack and Everett Edward Hack on December 13, 1951, made no reference to the passage of any counterfeit instruments in Indiana, nor any discussion as to the two Hacks being associated with Ada Miller and David Bocock, and their names were not mentioned; in that conversation, according to Monroe Ellis Hack, the defendant wanted him to go back to California and be a distributor out there. (R. 24.) Monroe said he told Everett, "Well, I'll think it over." (R. 24.) He then went directly to the police and to the Secret Service Agent in Indianapolis; the Secret Service Agent in Indianapolis told him to see Secret Service Agents in Louisville, which he did on the following Sunday; on Monday, December 17, 1951, in Louisville, while working under the instructions of the Secret Service Agents in Louisville, Monroe says he received fourteen counterfeit notes from defendant Bocock, six or seven of which Monroe passed in Louisville on that date, he says with knowledge of the Secret Service Agents, and with Ada Miller and Bocock following him to his various victims, Miller and Bocock not knowing that Secret Service Agents had been alerted. (R. 26, 27, 28, 29, 30, 31, 32.)

4. There is no evidence of any kind to connect Everett Edward Hack with any of the transactions in Louisville. We have heretofore shown that he had no connection with anyone in the passage of the counterfeit bill on December 15, 1951.

5. There is no charge in the indictment that Everett Edward Hack conspired with Monroe Ellis Hack, or that Everett Edward Hack conspired with anyone to pass counterfeit money in Louisville; Monroe Ellis Hack was not charged as a co-conspirator in the Indiana conspiracy, and no one is referred to in the indictment as being "an unknown" conspirator.

There is simply no evidence to connect Everett Edward Hack with the Indiana conspiracy charged in the indictment.

6. It is important to note that there is no claim in the record that Monroe Ellis Hack had any connection of any kind with Everett Edward Hack after December 13, 1951, except his request by telephone for money on December 17th; there is no claim that Monroe was acting in concert with Everett in any of the Louisville transactions; there is no denial of Monroe's evidence as to his collaborating with the Chief of Police and the Secret Service Agents in Louisville as to the passing of counterfeit bills in Louisville; they wanted to get samples of the bills; under these facts and circumstances, none of the acts and declarations of Monroe Ellis Hack in Louisville could be used to convict Everett Edward Hack of the alleged Indiana conspiracy; what Monroe said and did in Louisville was not in furtherance of any conspiracy which might have involved Everett, because whatever plot he may have had with any of the defendants clearly terminated when he began passing counterfeit bills in Louisville after his confession to the officers; in fact, he ceased his role as a conspirator, if he ever had one with Everett, when he called the police, and the Secret Service Agent at Indianapolis, and told them of his conversation with Everett; from thence forward, according to his testimony, for two or three days he was working under the surveillance of the Secret Service

Agents in Louisville in passing counterfeit bills in Louisville; as such, he was not a conspirator with either of the defendants; he was trying to get from the defendants some sample counterfeit bills for the Secret Service Agents. This being the undisputed record, all of the acts and declarations of Monroe Ellis Hack in Indianapolis and in Louisville, and all of the declarations of the officers aforesaid, were hearsay as to Everett, but such evidence was highly prejudicial as to him, and there is no substantial evidence in the record to convict Everett Hack on Count II.

7. The decision of the majority of the Court of Appeals that there is substantial evidence in the record to convict Everett Edward Hack on Count II is in conflict with the decisions of this Court in (a) *Fiswick* v. *United States,* 329 U. S. 211, 227, 67 S. Ct. 224, 227; (b) *Logan* v. *United States,* 144 U. S. 263, 309, and (c) *Krulewitch* v. *United States,* 336 U. S. 440, 442, 69 S. Ct. 716, 718, which hold that admissions and declarations of a co-conspirator after confession of his own guilt to officers, are inadmissible against his erstwhile fellow conspirators.

QUESTION FOUR

Rule 33, Federal Rules of Criminal Procedure, provides that

> "The Court may grant a new trial to a defendant if required in the interest of justice."

Counsel who represented the defendant at the trial filed a motion for new trial on November 17, 1952 (R. 136), within five days after the judgment was entered on November 13, 1952. (R. 134.) Such motion did not allege any inadequacy of counsel. (R. 136.) On December 11, 1952 other counsel appeared for the defendant (R. 137) and on December 16, 1952 such counsel filed petition for

leave to file an amended motion for a new trial, which was denied on the same date (R. 139), which amended motion would have contained allegations of inadequate counsel during the trial based upon allegations showing merely one hour for preparation for trial, absence of material defense witnesses, and unchallenged hearsay testimony. (R. 152.)

Refusal of the Court to allow defendant to file an amended motion for a new trial, under the facts disclosed by the record, was an abuse of the power given the trial Court, as it presented a question of the constitutional right of the defendant to have the Assistance of Counsel for his defense; the trial Court recognized that hearsay testimony was going to the jury without any objection, and manifested his concern about improper evidence going to the jury, but defendant's counsel passed the matter off by saying, "I am waiving it, Judge. Let him bring it all out," (R. 26); again the Court took cognizance of the improper hearsay and asked counsel if he was waiving objections to "this hearsay testimony" and counsel replied, "It doesn't make any difference. I just want to get through" (R. 28); pages 28 to 35 of the record, containing hearsay declarations and statements of Monroe Ellis Hack and his conversations with members of his family, and with the officers, were given without objection, and the Court reminded counsel for defendant that "a lot of irrelevant" and "inadmissible evidence was going in before the jury. It's the Government's case. You are waiving objection?" Counsel replied, "Yes, Sir," "Unless the Court wants to step in and stop it." (R. 35.)

Under the Sixth Amendment to the Constitution, defendant was entitled to have the Assistance of Counsel for his defense; this means that he was entitled to have adequate counsel; we believe a reading of pages 23 to 35

of the record will convince the Court that a large amount of very harmful and prejudicial hearsay testimony went into the record without objection, and defendant should have been given the opportunity to file his amended motion for a new trial, and the denial of such right was an abuse of judicial discretion. The decision of the majority of the Court of Appeals to the contrary is in conflict with the decision of the Tenth Circuit, in *Beckett* v. *Hudspeth, Warden,* 131 F. (2d) 195, 197, which holds that the constitutional guaranty of the right to "Assistance of Counsel" means effective assistance as distinguished from bad faith, sham, or mere pretense; and it is in conflict with *Thomas* v. *District of Columbia,* 90 F. (2d) 424.

In the case of *Burton* v. *United States,* 151 F. (2d) 17, 18, relied on by the Court of Appeals (R. 153), the Court pointed out that the introduction of the hearsay testimony in that case was not prejudicial. We do not believe it is a case where the admission of such hearsay testimony can be accounted for on the theory of "good trial strategy," as concluded by the Court of Appeals. (R. 153.) It is a violation of the due process clause of the Fifth Amendment.

We do not believe this question has been decided by this Court, although it is an important question of federal law.

QUESTION FIVE

The defendant was sentenced to five years imprisonment on Count I, which was the substantive offense for which it was alleged the conspiracy charged in Count II was formed, the defendant having been charged as an aider and abettor in Count I, and as a co-conspirator in Count II.

The evidence of the Government to convict defendant of the charge in Count I was the same as it relied upon to convict him of Count II. It was therefore a double punishment in violation of the Fifth Amendment to the United

States Constitution to sentence defendant to 5 years on Count I and to 3 years on Count II, and the decision of the Court of Appeals to the contrary is in conflict with the applicable decision of this Court in *Sealfon* v. *United States,* 332 U. S. 575, 68 S. Ct. 237.

The defendant was not charged as a principal in Count I; the Government admits that he had no direct connection with the passing of the note in question; if he did anything to procure the commission of the offense of passing, it was to conspire with some one else, and this makes the basic facts in each case identical, and the sentence of imprisonment on Count I should be set aside.

This question was not presented to the Courts below, but it is a plain error and defect affecting the substantial rights of the defendant, and will affect the rights of all other defendants similarly charged, and it should be noticed by this Court and corrected pursuant to Rule 52 (b), Federal Rules Criminal Procedure, and Rule 27, 6 of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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